UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ELIZABETH M. TAMPOSI, Plaintiff, v. STEPHANIE DENBY, ESQ.; BURKE WARREN MACKAY & SERRITELLA, P.C.; MICHAEL WEISMAN, ESQ.; REBECCA MCINTYRE, ESQ.; WEISMAN & MCINTYRE, P.C.; JULIE SHELTON, ESQ. individually and in her capacities as Trustee of the Elizabeth M. Tamposi GST Exempt Trust and the Elizabeth M. Tamposi Trust, both created under the Samuel A. Tamposi Sr. 1992 Trust, and in her capacity as Trustee of the Elizabeth M. Tamposi Trust, created under the Samuel A. Tamposi Sr. 1994 Irrevocable Trust; BUTLER RUBIN SALTARELLI & BOYD, LLP; and BAKER & DANIELS LLP, Defendants.	CIVIL ACTION NO. 1:10-CV-12283-RBC

MEMORANDUM IN SUPPORT OF THE SHELTON CLAIMANTS' MOTION FOR THE ENTRY OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AGAINST DEFENDANTS MICHAEL WEISMAN, REBECCA MCINTYRE, AND W&M – TO ORDER THAT $5 MILLION BE PAID INTO ESCROW UPON RECEIPT

Defendants Julie Shelton, Butler Rubin Saltarelli & Boyd, LLP and Faegre Baker Daniels LLP[1] (together, the "Shelton Claimants") hereby move, pursuant to Fed. R. Civ. P. 65, for entry of a temporary restraining order and preliminary injunction to secure at least a portion of their recovery in this case against defendants Michael Weisman ("Weisman"), Rebecca McIntyre ("McIntyre"), and the now inactive law firm of Weisman & McIntyre, P.C. ("W&M").

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[1] Faegre Baker Daniels is the successor by merger to Baker & Daniels, LLP ("Baker Daniels"). Baker Daniels no longer has a separate existence.

Weisman obtained a large verdict as counsel for the plaintiff in *Evans v. Lorillard Tobacco Co.*, No. 2004-2840 (Mass. Super. Ct. Dec. 16, 2010) (the "Lorillard Case"). The case settled for $79 million, and the settlement was publicly announced on October 23, 2013. In connection with the final disposition of that case, Weisman, McIntyre, and/or W&M are expected to receive a fee of at least $10 million in the near future. Before those monies are received and dissipated, Weisman, McIntyre, and W&M should be ordered to cause $5 million of that fee to be placed in escrow. As explained below, there are no other resources available to satisfy the Shelton Claimants' likely judgment against Weisman, McIntyre, and W&M.

I. FACTUAL BACKGROUND

A. Weisman, McIntyre and W&M Represented Ms. Shelton And Elizabeth Tamposi.

The background facts are familiar to this Court. Ms. Shelton was asked to serve as Trustee of two Trusts for the benefit of plaintiff Elizabeth Tamposi (the "EMT Trusts"). The EMT Trusts were created by Elizabeth Tamposi's father, Samuel Tamposi, Sr. Affidavit of Julie Shelton ("Shelton Aff."), ¶ 4. Samuel Tamposi, Sr., designated two of his sons, Samuel Tamposi, Jr. and Stephen Tamposi as the "Investment Directors" of the EMT Trusts. *Id.*

On or about September 14, 2007, Ms. Shelton and Elizabeth Tamposi jointly retained Weisman and W&M as counsel. Shelton Aff., ¶ 8. In reliance on Weisman's legal advice,[2] Ms. Shelton, as Trustee of the EMT Trusts, joined Elizabeth Tamposi in bringing suit against the Investment Directors in Probate Court in New Hampshire: *Julie Shelton, Trustee, et al. v. Samuel A. Tamposi, Jr., et al.*, N.H. Probate Action No. 316-2007-EQ-2109 (the "N.H. Probate

[2] Ms. Shelton also relied on legal advice from Stephanie Denby, her Trust counsel. Ms. Denby was the architect of the strategy to press the Investment Directors for funds. Because the instant motion seeks relief from Weisman, however, this Memorandum does not address Ms. Denby's responsibility, which is substantial. Mr. Weisman, Ms. McIntyre and Ms. Denby are jointly and severally liable for any harm to Ms. Shelton. *See* Docket No. 53 (Counterclaim and Crossclaims of the Shelton Claimants), ¶¶ 29-43.

Action"). Shelton Aff., ¶ 2. The purpose of the N.H. Probate Action was to gain access to funds that could be distributed from the Trusts to or for the benefit of Elizabeth Tamposi and her three children. Shelton Aff., ¶ 10. Ms. Shelton sought, and could obtain, no personal gain in connection with the case.

Weisman, McIntyre and W&M represented and advised both Ms. Shelton and Elizabeth Tamposi beginning prior to the filing of the initial Complaint and continuing until the post-trial decision was rendered in the N.H. Probate Action. Shelton Aff., ¶ 9.

B. Ms. Shelton Has Incurred Liability For Attorneys' Fees, In The N.H. Probate Court, As The Result Of The Conduct Of Weisman, McIntyre And W&M.

Weisman, as lead counsel, together with McIntyre, his partner, filed the Complaint in the N.H. Probate Action. The Complaint asserted a claim for breach of fiduciary duty and other causes of action. The Probate Court judge ruled that a complaint for breach should not have been lodged, and that the issues should have been presented in a petition for instructions instead. *See* Affidavit of Robert S. Frank, Jr. ("Frank Aff."), Ex. 1, p. 48. Ms. Shelton relied on her counsel to determine the specific causes of action stated and the proper procedure for asserting them in the Probate Court. *See* Shelton Aff., ¶ 11.

The positions taken by Weisman, McIntyre and W&M in the N.H. Probate Action were aggressive. The decision of the court in the N.H. Probate Action was adverse to Ms. Shelton and Elizabeth Tamposi. Weisman, McIntyre and W&M never explained to Ms. Shelton that, by asserting the positions advanced in the Complaint (which bore the name of Michael Weisman) and the Amended Complaint (which bore the name of Michael Weisman and Rebecca McIntyre), and by advancing the arguments that Weisman and McIntyre presented, Ms. Shelton was incurring the risk of personal liability. Shelton Aff., ¶ 12. However, the N.H. Probate Court did find that the positions articulated by Weisman and McIntyre were advanced in bad faith. As a result, it ordered that Ms. Shelton personally -- and not the EMT Trusts themselves -- pay an award of legal fees to the Investment Directors and Intervenors. The New Hampshire Supreme Court affirmed that Order. *See* Frank Aff., Ex. 1, p. 49; *Shelton v. Tamposi*, 62 A.3d 741, 751-52 (N.H. 2013).

During the trial, cross-examination by the Investment Directors revealed that Elizabeth Tamposi was not telling the truth. The Probate Court so found. *See* Frank Aff., Ex. 1, p. 24 ("Betty falsely reported that she had been self-employed . . . misstated the value and her ownership of . . . property" and uttered other "falsehoods."); *id.* at 27 ("The court disbelieves that Betty would have no recollection of such significant and momentous occurrences touching her financial self-interest . . . ."); *id.* at 45 ("[Elizabeth Tamposi's] testimony of having no recollection of being told about and discussing her father's trust and estate plan at that time provokes sentiment going beyond mere disbelief."). This was a stunning development. *See* Shelton Aff., ¶ 13. In these circumstances, Weisman, McIntyre and W&M knew, or should have known, that there was a conflict of interest between their client, Ms. Shelton, and their client, Elizabeth Tamposi. However, they did nothing to distinguish Ms. Shelton's conduct from Elizabeth Tamposi's conduct. Ms. Shelton was not a participant in, and had no prior knowledge of, Elizabeth Tamposi's falsehoods. Moreover, the Court found that the N.H. Probate Action was brought for Elizabeth Tamposi's personal gain; while, by contrast, Ms. Shelton sought, and could obtain, nothing for herself in the N.H. Probate Action. Weisman, McIntyre and W&M did not call these facts, or other distinguishing factors, to the attention of the Court. *See* Shelton Aff., ¶ 13. As a result, Ms. Shelton was tarnished by association with Elizabeth Tamposi, and she was included in the finding that the N.H. Probate Action was prosecuted in bad faith. *See*

Frank Aff., Ex. 1, pp. 45, 50. This finding resulted directly from the actions and omissions of Weisman, McIntyre and W&M.

C. The Shelton Claimants Stand To Win Judgment Of At Least $5 Million On Their Crossclaims Against Weisman, McIntyre And W&M.

The Shelton Claimants have brought crossclaims for legal malpractice, and for equitable indemnification, against Weisman, McIntyre and W&M, among others. *See* Docket No. 53, ¶¶ 91-96, 104-09. As a result of the malpractice of Weisman, McIntyre and W&M, Ms. Shelton is exposed, among other things, to the fee order entered by the N.H. Probate Court. *See* Frank Aff., Ex. 1, pp. 49, 53. The Probate Court ruled that it will enter an award of legal fees, against both Ms. Shelton and Elizabeth Tamposi, for the reasonable attorneys' fees of the Investment Directors and the Intervenors. *Id.* On September 17, 2010, the Investment Directors and Intervenors applied for fees of more than $3.4 million. Frank Aff., Ex. 2. On April 15, 2013, they filed a supplemental request, now claiming total legal fees of approximately $4 million. Frank Aff., Ex. 3. The amount of the fee award has not yet been determined. Shelton Aff., ¶ 16.

The Successor Trustee, James DeGiacomo, has filed a motion for surcharge, which seeks to recover from Julie Shelton approximately $4 million. Shelton Aff., ¶ 17.

As a result of the malpractice in the N.H. Probate Action, Julie Shelton is exposed to substantial liability in the N.H. Probate Action cited in this action. The Shelton Claimants have incurred attorney fees of more than $3 million in defending against this exposure. Frank Aff., ¶ 19.

In view of (a) the existing order awarding fees and the application for $4 million against Ms. Shelton, (b) the surcharge motion seeking $4 million, and (c) the more than $3 million already spent on legal fees in these matters -- and because Ms. Shelton is likely to prevail on her crossclaim for legal malpractice -- the Shelton Claimants are likely to obtain a judgment against Weisman, McIntyre, and W&M in the amount of at least $5 million.

D. Weisman, McIntyre And W&M Have No Insurance, And Their Defense Counsel Is Working Without Payment.

Unless the Court enters the requested Order, it is likely that the Shelton Claimants will not be able to recover their judgment against Weisman and McIntyre.

Weisman & McIntyre, P.C. is inactive. *See* Frank Aff., ¶ 3. Counsel for Weisman, McIntyre and W&M has informed the other parties to this case that they do not have malpractice insurance available to cover any judgment in this matter. *See* Frank Aff., ¶ 4. In their Initial Disclosures, made pursuant to Fed. R. Civ. P. 26(a)(1), Weisman, McIntyre and W&M state that there is no applicable insurance. *See* Frank Aff., Ex. 4.

Counsel for Weisman, McIntyre and W&M has informed the Shelton Claimants that, apart from the fee that Weisman, McIntyre and W&M will receive in the Lorillard Case, Weisman, McIntyre and W&M (a) have no substantial assets, and (b) cannot respond to a judgment in this case. *See* Frank Aff., ¶ 7. Moreover, their counsel has informed the other parties -- and has represented to the Court -- that Weisman, McIntyre and W&M are not able to pay legal fees and expenses in this matter. *See id.*, ¶ 5 and Ex. 5 (June 18, 2013 email from Camille F. Sarrouf, Sr., Esq. to Matthew McGinnis, Esq., *et al.*) ("As advised from the beginning, the Weisman Parties are at the present time unable to pay legal fees and expenses."). Weisman and McIntyre were asked to agree voluntarily to place $2 million of the fee in escrow. They refused. *See id.*, ¶ 10.

E. Weisman, McIntyre And/Or W&M Are Expected To Receive A Very Substantial Fee In The Lorillard Case.

Weisman, McIntyre and/or W&M are expected to receive, or have already received, a very substantial fee arising from the Lorillard Case. Weisman represented the plaintiff (Evans) at trial against a cigarette manufacturer (Lorillard). McIntyre brought the case to Weisman, and until their firm ceased to be active, the case was handled by Weisman & McIntyre, P.C. *See* Shelton Aff, ¶ 19. On information and belief, Weisman handled the Lorillard Case on a contingent fee basis. *See* Shelton Aff., ¶ 19.

The jury in the Lorillard Case returned a large verdict for the plaintiff. *Evans v. Lorillard Tobacco, Co.*, No. 2004-2840-A (Mass. Super. Ct. Dec. 16, 2010). The Superior Court reduced the compensatory damages to $35 million, *Evans v. Lorillard Tobacco, Co.*, No. 2004-2840-A, 2011 Mass. Super. LEXIS 302, at * 10 (Mass. Super. Ct. Sep. 1, 2011), and awarded Weisman $2,597,377.67 in fees and costs under Mass. Gen. Laws ch. 93A. *Evans v. Lorillard Tobacco, Co.*, No. 2004-2840-A, 2011 Mass. Super. LEXIS 293, at * 1 (Mass. Super. Ct. Dec. 2, 2011).

On June 11, 2013, the Supreme Judicial Court affirmed the compensatory damage award of $35 million. *Evans v. Lorillard*, 465 Mass. 411, 414-17 (2013). The case was remanded for a new trial with respect to punitive damages, and for further proceedings with respect to the Chapter 93A claim. *Id.* The case settled for $79 million. *See* Frank Aff., Ex. 8. It is reasonable to expect that the contingent fee for Weisman and McIntyre will amount to at least $10 million.

On remand, the plaintiff in the Lorillard Case first sought a separate judgment under Rule 54(b). *See* Frank Aff., Ex. 6. Then, on September 26, 2013, proceedings in the Lorillard Case were stayed at the request of both parties. *See* Frank Aff., Ex. 6. The Lorillard Case has now been settled. On October 10, 2013, the parties filed a stipulation of dismissal. *See* Frank Aff., Ex. 6. It thus appears likely that Weisman and/or McIntyre have received, or will shortly receive, a substantial amount of money.

On October 15, 2013, counsel for the Shelton Claimants met with and corresponded with counsel to Weisman, McIntyre and W&M. Counsel for the Shelton Claimants asked counsel to

Weisman, McIntyre and W&M, including by email, whether he could provide assurance that Weisman, McIntyre and W&M would retain an unencumbered portion of the Lorillard Case payment in an amount sufficient to respond to any judgment in this case. Frank Aff., ¶ 10 and Ex. 7. On December 12, counsel stated the final answer that they would not provide such assurance. *Id.*, ¶ 9. Counsel indicated that the payment from the Lorillard Case likely will be received by his clients soon after December 15. *Id.*, ¶ 8.

As a result, the Shelton Claimants are filing the instant motion in order to assure that at least a minority portion of the funds that Weisman, McIntyre, and W&M would otherwise receive will be available to respond to a judgment in favor of the Shelton Claimants in this action. They ask only that the funds be held in escrow by counsel to Weisman, McIntyre, and W&M in this case.

II. THE APPLICABLE STANDARD

The Shelton Claimants ask the Court to require that Weisman, McIntyre, and W&M pay to an escrow account $5 million of the far greater amount that they have received, or will receive, as a result of the *Lorillard* settlement. This narrowly tailored relief is well supported by recent precedent in this circuit and this district.

- In *Micro Signal*, for example, Judge Harrington entered "a preliminary injunction requiring [the defendants] to pay to [the plaintiff] or into the registry of the district court all funds up to $210,000 that they are presently earning from their new business entity." The First Circuit affirmed. *See Micro Signal Research, Inc. v. Otus*, 417 F.3d 28, 29, 31-33 (1st Cir. 2005).
- In *Erkan v. New England Compounding Pharmacy, Inc.*, Civ. A. Nos. 12-12052-FDS, 12-12066-FDS, 2012 WL 5896530, at *1, *3 (D. Mass. Nov. 21, 2012),

Judge Saylor entered a similar preliminary injunction, which restrained the defendant from making expenditures outside the ordinary course, so that the defendant could not "avoid future judgments."

- In *Ayaz v. Livewire Mobile, Inc.*, Civ. A. No. 13-cv-11330, 2013 U.S. Dist. LEXIS 90457, at *8-18 (D. Mass. June 27, 2013), Judge Saris entered a preliminary injunction, which ordered the defendant to place $2 million in escrow, from the proceeds of designated assets, in order to preserve an equitable remedy of indemnification.

As the First Circuit has explained, the instant motion is governed by the "familiar four-part test" for preliminary injunctions under Fed. R. Civ. P. 65. *See Micro Signal*, 417 F.3d at 31. *See also Charlesbank Equity Fund II, L.P. v. Blinds To Go, Inc.*, 370 F.3d 151, 160 (1st Cir. 2004) ("[P]rejudgment freeze order is in the nature of an injunction and . . . therefore, its propriety should be analyzed under the traditional four-part test."). Under the "familiar four-part test," the court weighs four factors:

> (1) the moving party's likelihood of success on the merits; (2) the potential for irreparable harm in the absence of an injunction; (3) whether issuing the injunction will burden the defendants less than denying an injunction would burden the plaintiffs; and (4) the effect, if any, on the public interest.

Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 10 (1st Cir. 2012) (ordering district court to issue injunction where standard was met).[3]

It is well established that "[i]n some situations, federal courts possess general equitable power to issue prejudgment injunctions in the nature of freeze orders so as to ensure the adequacy of postjudgment remedies." *Charlesbank*, 370 F.3d at 158. In *Charlesbank*, the Court held, in the circumstances of that case, that a freeze order may not be issued where the moving party does not have a preexisting lien or equitable interest, citing *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999). *Charlesbank*, 370 F.3d at 159. However, subsequent decisions have explained that this precedent applies only where the sole requested remedy is a remedy at law. *See, e.g.*, *Revolutions Medical Corp. v. Medical Investment Group, LLC*, Civ. A. No. 12-10753-GAO, 2012 U.S. Dist. LEXIS 186815 (D. Mass. Nov. 7, 2012) (collecting cases).

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[3] Before *Micro Signal* and *Charlesbank* were decided, earlier cases left room for doubt as to whether requests for prejudgment freeze orders are governed by Fed. R. Civ. P. 64 or Fed. R. Civ. P. 65. *Micro Signal* and *Charlesbank* hold that Rule 65 applies, and that the four-part test for a preliminary injunction should be applied. *See Charlesbank*, 370 F.3d at 23 (citing *Hunter v. Youthstream Media Networks, Inc.*, 241 F. Supp. 2d 52, 54 (D. Mass. 2002) (Collings, Mag.) as "applying the traditional four-part preliminary injunction standard in analogous circumstances").

That is not this case. The Shelton Claimants are being harmed by a fee order in the N.H. Probate Court -- an equitable action. To redress this harm, they seek equitable indemnification from Weisman, McIntyre and W&M. *See* Shelton Crossclaims, ¶¶ 104-109. Equitable indemnification is an equitable remedy. *See, e.g.*, *In re Spigel*, 260 F.3d 27, 35 (1st Cir. 2001) ("theory of equitable indemnification . . . allows one exposed to liability solely as the result of a wrongful act of another . . . to recover from that party") (internal quotations omitted). Judge Saris applied exactly this analysis in *Livewire*, *supra*. The court entered a preliminary injunction, overruling an objection based on *Grupo Mexicano,* in order to preserve equitable indemnification as a potentially effective remedy. *See* 2013 U.S. Dist. LEXIS 90457, at *14-16.

III. ARGUMENT

Trial courts have "wide discretion" when applying the four-part test for a preliminary injunction. *Charlesbank*, 370 F.3d at 162. The Shelton Claimants seek very narrow relief. All four factors favor granting the instant motion.

A. The Shelton Claimants Are Likely To Prevail Against Weisman, McIntyre And W&M.

The Shelton Claimants are likely to prevail on their crossclaims against Weisman, McIntyre and W&M, and they are likely to recover a judgment in the amount of at least $5 million.

Weisman, McIntyre and W&M filed the Complaint and the Amended Complaint in the N.H. Probate Action. They conducted discovery and motion practice. Weisman and McIntyre were the only counsel who spoke at trial on behalf of the petitioners (Elizabeth Tamposi, the beneficiary, and Ms. Shelton as Trustee). Weisman handled the opening argument and the closing argument. He presented, or cross-examined, most of the witnesses. After trial, having heard the evidence and arguments presented by Weisman, the Probate Court ruled that Elizabeth Tamposi and Ms. Shelton, as Trustee, acted in bad faith by prosecuting this action. Frank Aff., Ex. 1, p. 45. This finding was a direct result of the pleadings signed, and the positions advanced and personally articulated, by Weisman, McIntyre and W&M.

Because the Probate Court ruled that the positions taken by Weisman, McIntyre and W&M were asserted in bad faith, it held that Elizabeth Tamposi and Ms. Shelton must bear the reasonable attorneys' fees of the Investment Directors and the Intervenors. *Id.*, pp. 49, 53. Weisman, McIntyre and W&M did not at any time during the course of the case advise Ms. Shelton -- who participated in the N.H. Probate Action solely in her capacity as Trustee of the EMT Trusts -- that she might be subject to personal liability for the legal fees of the opposing parties. Shelton Aff., ¶ 12.

Moreover, Weisman, McIntyre and W&M represented both Ms. Shelton and Elizabeth Tamposi, even after a profound conflict of interest arose at trial. Cross-examination by the Investment Directors revealed that Elizabeth Tamposi made pre-trial statements that were, and gave testimony at trial that was, untruthful. Thereafter, Weisman, McIntyre and W&M did not protect Ms. Shelton from the consequences of Elizabeth Tamposi's conduct. They did not allow her to testify that she had no knowledge of Elizabeth Tamposi's false statements and testimony. And, they did not distinguish between Elizabeth Tamposi's motivation and the absence of any self-interested conduct by Ms. Shelton. As a result, Ms. Shelton was tarnished by association with Elizabeth Tamposi and subject, among other things, to a fee award.[4] Shelton Aff., ¶ 14-16. *See R&R Associates of Hampton v. Thomas*, 402 F.3d 257 (1st Cir. 2005) (duty of care was breached by an actual conflict of interest).

The amount of the fee award has not yet been determined. The Investment Directors and Intervenors have submitted an application for approximately $4 million in fees and expenses. Frank Aff., Ex. 2, pp. 3-5; *id.*, Ex. 3, pp. 7-9. The Shelton Claimants have already incurred more than $3 million in attorney fees. Frank Aff., ¶ 19. The Shelton Claimants are likely to obtain a judgment of at least $5 million against Weisman, McIntyre and W&M. *See Sindicato Puertorriqueño de Trabajadores*, 699 F.3d at 32, 37 (where plaintiffs demonstrated likelihood of success, directing district court to enter preliminary injunction prohibiting defendants from enforcing certain statutory provisions challenged by plaintiffs). The $5 million escrow that is requested here is a conservative sum.

B. The Shelton Claimants Will Suffer Irreparable Harm In The Absence Of The Injunction.

If the requested injunction is not entered, there will be no means to satisfy the likely judgment. Counsel for Weisman, McIntyre and W&M has stated that:

[4] The Successor Trustee of the EMT Trusts is seeking to surcharge Ms. Shelton for all payments made to, or for the benefit of, Elizabeth Tamposi. That claim is in the amount of an additional $4 million. Ms. Shelton denies liability for any surcharge. That dispute has not yet been decided in the N.H. Probate Action. If a surcharge is made, the amount of that surcharge will be added to Ms. Shelton's claim against Weisman, McIntyre and W&M.

- Weisman, McIntyre and W&M have no malpractice insurance (Frank Aff., ¶ 4);
- W&M exists, but is no longer an active law firm (Frank Aff., ¶ 3);
- Weisman, McIntyre and W&M do not have funds to pay for their counsel and/or their other legal expenses (Frank Aff., ¶ 5 and Ex. 5); and
- Weisman, McIntyre and W&M do not have assets sufficient to satisfy a judgment in any amount (Frank Aff., ¶ 6).

By their own account, therefore, the only means available to satisfy a judgment against Weisman, McIntyre and W&M will be the fees received in the Lorillard Case. Weisman, McIntyre and W&M provided no assurance that they would retain an unencumbered portion of the Lorillard Case payment in an amount sufficient to respond to any judgment in this case. *See* Frank Aff., ¶ 10. Weisman and McIntyre were asked to place $2 million in escrow voluntarily. They refused. *Id.*, ¶ 10.

For the reasons stated above, if the requested order is not entered, there is substantial risk that the fees from the Lorillard Case will be diverted to other uses. Because no other means of recovery exists, the diversion of those funds would constitute irreparable harm. As Judge Saylor ruled in *Erkan*, a "limited restraint of assets is appropriate in order to prevent any extraordinary transfer of cash" that would "avoid future judgments." *See Erkan*, 2012 WL 5896530, at *3. *See also Scarcelli v. Gelichman*, Case No. 2:12-cv-GZS, 2012 U.S. Dist. LEXIS 57776, at *11-12 (D. Me. Apr. 25, 2012) ("Once those funds are in her hands, the risk of diversion . . . is substantial, and such amount may be quickly consumed and utilized to deal with one or more of the other financial exigencies she faces. . . . Under these circumstances, the Limited Partner will suffer irreparable harm and there will be in effect no adequate remedy at law.").

C. The Balance Of Equities Tips In Favor Of Preserving The Ability To Recover From Weisman, McIntyre, And W&M.

The limited relief sought by the Shelton Claimants will not harm Weisman, McIntyre, or W&M in any cognizable fashion. The injunction sought would require a portion of the fee to be received by Weisman, McIntyre, and/or W&M in connection with the Lorillard Case be paid into escrow and held there by Weisman's, McIntyre's, and W&M's own counsel, a lawyer of extremely high personal repute. The injunction will not disturb their ability to receive payment in excess of $5 million. There is no reason to believe that holding $5 million in escrow will harm Weisman, McIntyre, or W&M -- and if it did, that would merely underscore the need for an injunction. *See, e.g., Scarcelli*, 2012 U.S. Dist. LEXIS 57776, at *13 ("Any presumed claim for an immediate need for funds to deal with other financial exigencies demonstrates the irreparable harm to the Limited Partner by the dissipation of the sale proceeds with no effective recourse").

The Shelton Claimants seek relief in order to preserve their ability to recover on their malpractice claim. A responsible lawyer is expected to maintain malpractice insurance. *See, e.g., Schoenefeld v. State of New York*, 907 F. Supp. 2d 252, 264 (N.D.N.Y. 2011) ("[T]he majority of attorneys maintain some form of professional liability insurance to mitigate the cost of any potential money judgments awarded against them."). Weisman, McIntyre and W&M knew of the potential existence of Ms. Shelton's claim when they failed to maintain adequate malpractice insurance. If such insurance were available, the present motion would be unnecessary.

Where the lawyer (Weisman, McIntyre and W&M) chooses not to maintain insurance, and is now seeking to avoid posting security, the balance of equities favors the client (Shelton), who is seeking to secure a judgment for malpractice. *See Sindicato Puertorriqueño de*

Trabajadores, 699 F.3d at 34-37 (directing district court to enter a preliminary injunction where the plaintiff demonstrated that the balance of harms tipped in plaintiff's favor).

D. The Public Interest Will Be Served By Preserving The Ability To Recover From Weisman, McIntyre and W&M.

For similar reasons, it is consistent with the public interest to protect the Shelton Claimants' opportunity to recover from Weisman, McIntyre, and W&M. Litigants should not be allowed to avoid the consequences of their actions by dissipating funds that would otherwise be available to pay a judgment. *See Livewire*, 2013 U.S. Dist. LEXIS 90457, at * 17 ("[T]he public has an interest in corporations protecting officers and directors from shouldering tax liabilities that the corporation should be paying itself."). The public interest is advanced by protecting the client where a lawyer elects not to maintain adequate malpractice insurance.

IV. CONCLUSION

For the foregoing reasons, the Shelton Claimants respectfully request the entry of a temporary restraining order and a preliminary injunction ordering that:

> Defendants Michael Weisman, Rebecca McIntyre, Weisman & McIntyre, P.C., and all others conspiring, acting in concert or otherwise participating with them or acting in their aid or on their behalf, shall cause to be paid into escrow $5 million of any fees that they receive, directly or indirectly, in connection with the case of *Evans v. Lorillard Tobacco Co.* The escrow funds shall be held by Camille Sarrouf, Sr., Esq., and shall be released only (i) upon the satisfaction of the Crossclaims against Weisman, McIntyre and Weisman & McIntyre, P.C. by the Shelton Claimants in this action, or (ii) upon further Order of this Court.

Respectfully submitted,

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BUTLER RUBIN SALTARELLI & BOYD,
LLP

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Dated: December 12, 2013

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and that paper copies will be sent to those non-registered participants (if any) on December 12, 2013.

/s/ Robert S. Frank, Jr.
Robert S. Frank, Jr.